Mr Reginald Vallipuram submitted that the accumulation of interest, if the defendants are made liable, was as a result of undue delay in pursuing the claim by the appellant. These were the following factors that contributed to the delay:

(i) The receiver was supposed to have sold the property in August 1983 at a reserve price of $340,000.

(ii) Since a third party had an unsecured judgment against the principal debtor, the appellant had to apply for an order for sale. The bank was finally successful in getting an order to dispose (see *United Malayan Banking Corp Bhd* v *Official Receiver & Liquidator of Soon Hup Seng Sdn Bhd (In Liquidation) & Anor*[3]). The property was only eventually sold on 19 April 1986 when the price dropped to $210,000 only.

Due to the effect of all these, the defendants not only have to bear the difference but also the accumulated interest after the winding up if the defendant is found to be liable. All this time, the appellant made no demand on the defendant, demand being made only in 1986. Counsel submitted that the appellant bank should claim in damages.

(iii) Penalty interest. In the claim, the plaintiff has imposed a penalty interest of $82,976.10. The question is whether the appellant could impose a penalty interest on the principal debtor. In the letter of offer KBK-1 p 4 of encl (18) there was no provision made for penalty of interest. The appellant having taken $82,976.10 and also after taking $72,117.20 in accumulated interest having only a small balance to reduce the principal amount. The fifth defendant raised in para 4 of his affidavit in encl (18) that while the appellant is empowered to increase interest, the interest of 14.5% pa was excessive and unconscionable and the court ought to have it reviewed.

(iv) The fifth defendant also has a complaint against the appellant's imposition of interest at a flat rate of 14.5% pa on all facilities. He submitted that this is also wrong. The rate is different from the rate given in the letter of offer KBK-1 p 2. Different rates was given for different facilities, eg the secured overdraft was based on the prime lending rate. If base lending rate was 7.5%, on secured overdraft interest could be 11% and interest on trust was 8.5% but in spite of these different rates the appellant claimed in statement of claim a flat rate of 14.5% on fixed loan and overdraft balance.

(v) Again the defendants contended that the appellant had acted unfairly in converting interest at 14.5% pa as per ABA-4 and ABA-5 encl (22) into 14.5% at monthly rest as stated under the heading item (b) in the statement of claim. The defendants contended this is claiming interest at a higher rate if defendant is made liable. If everything is considered, the defendants' counsel contended that the bank's claim is fraught with uncertainties as the question can be asked, what is the real amount due to appellant?

(vi) As to the certificate being a final document as to the state of defendants' indebtedness, the defendants' counsel submitted that the certificate is based on the state of the appellant's accounts. He submitted that the defendants have shown manifest error in the account on which the certificate is based.

In view of the complicated nature of this claim, I make a finding that the matter should also go to trial under the heading of 'some other reason for trial'.

For the reasons given, I make an order dismissing this appeal with costs to the defendants to be taxed.

Order accordingly.

Solicitors: *Tan & Tan; Vincent Lai & Co; Reginald Vallipuram & Co.*

Reported by *Yap Shao Sin*

Ling Tee Huah Credit & Leasing Sdn Bhd & Ors v Lii Tat Credit Mortgage Sdn Bhd & Anor

HIGH COURT (SIBU) — ORIGINATING SUMMONS NO 23 OF 1988
CHONG SIEW FAI J
30 MARCH 1989

Land Law — Caveat — Application to remove — Locus standi of applicants — Loan agreement — Legal disability — Registrable interest — Interpretation — Whether consent of chargee required — Land Code (Sarawak) (Cap 81), ss 177(1), (2) & 173(a)

The second to eighth plaintiffs and the second defendant were registered owners of a parcel of land described as lot 3206 Seduan Land District, Sibu, each holding 1/8 undivided share. All the eight co-owners charged the land to the first plaintiff which was registered at the Sibu Land Registry Office on 21 February 1986. The charge contained a covenant against dealing during the existence of the charge. On 27 February 1987, a loan agreement was entered into between the first defendant as lender and the second defendant as borrower under which the latter borrowed from the first defendant a sum of $60,000. The said loan agreement contained a clause allowing the first defendant to caveat the second defendant's lands then or thereafter acquired. On 14 March 1987, a caveat was so lodged by the first defendant without the consent of the first plaintiff as prior chargee. On 16 October 1987, the said land lot 3206 was subdivided into eight lots each with a separate land title with the second to eighth plaintiffs and the second defendant each holding 1/8 undivided share in each of the eight lots and the caveat lodged by the first defendant was duly registered. The plaintiffs applied to remove the caveat.

Held, allowing the plaintiffs' application:

(1) On the first defendant's contention that the first plaintiffs had no locus standi, the court held that the first plaintiff was entitled to make this application as a registered chargee and came

within s 177(1) of the Land Code (Sarawak) (Cap 81). The other plaintiffs were registered co-proprietors and were similarly affected and thus had locus standi to seek the relief.

(2) The second defendant was under no legal disability merely because of the charge created in favour of the first plaintiff to enter into the loan agreement with the first defendant. A caveat does not come within the definition of 'dealing' and the covenant in the charge prohibiting the registration of dealing without the consent of the first plaintiff is of no assistance to the first plaintiff.

(3) The first defendant had not obtained a registrable interest as the loan agreement was not a memorandum of charge capable of being registered as such under the Land Code, nor was it to all intents and purposes an agreement for a charge.

(4) A caveat is not an instrument of dealing and by itself confers no registrable interest. It does not create an interest or title to land.

(5) Without the consent of the first plaintiff as the prior chargee, the second defendant was under a disability to grant a further charge or agreement to grant a further charge capable of conferring a registrable interest in land in respect of which a caveat may be lodged.

Cases referred to

1 *Pok Kew Chai* v *Yeoh Thian Seng & Anor* [1975] 1 MLJ 220 (refd)

2 *R & I Securities Sdn Bhd* v *Golden Castle Finance Corp (M) Bhd* [1979] 1 MLJ 46 (folld)

Legislation referred to

Land Code (Sarawak) (Cap 81) ss 177(1), (2), 173(a)

George Lim for the plaintiffs.
Lily Wong (Mdm) for the first defendant.
Second defendant absent.

Cur Adv Vult

Chong Siew Fai J: This is an application to remove a caveat dated 14 March 1987 lodged by the first defendant (a limited company) and registered at the Sibu Land Registry Office on 18 June 1987 as Instrument No L 3616/1987 against 1/8 undivided share in a parcel of land described as lot 3206 Seduan Land District, Sibu together with the buildings thereon and appurtenances thereof belonging to the second defendant Ling Ting Sing.

Ling Ting Sing was, by order of court made on 9 November 1988, added as the second defendant in this action.

The basis for lodging the caveat is that the first defendant claims 'to be entitled to or to be beneficially interested' in the second defendant Ling Ting Sing's 1/8 undivided share in the said land by virtue of a loan agreement dated 27 February 1987 made between the first defendant as lender and the second defendant as borrower under which the latter borrowed from the first defendant a sum of $60,000. One of the conditions of the said loan agreement reads:

> 7 The borrower hereby agrees that the lender shall have the liberty to caveat all or any of the borrower's landed properties already acquired or hereafter to be acquired by the borrower and such caveat or caveats shall not be withdrawn or defeated by lapse of time until the said loan together with interest thereon has been fully repaid by the borrower.

The registered owners of the said land lot 3206 were plaintiff Nos 2 to 8 and the second defendant, each holding 1/8 undivided share. Prior to the second defendant entering into the said loan agreement dated 27 February 1987, all the eight co-owners including the second defendant had charged the land to the first plaintiff (a limited company) by a memorandum of charge dated 20 December 1985 and registered at the Sibu Land Registry Office on 21 February 1986 as Instrument No L 808/1986. As is normally the case, the said charge contains a covenant against dealing during the existence of the charge, and it reads:

> And we, ... (ie plaintiff Nos 2 to 8 and the second defendant) the registered co-proprietors/proprietresses and Ling Tee Huah Credit And Leasing Sdn Bhd, the chargee, hereby agree that during the period of this charge, no dealing shall be registered against the property unless the chargee has given its consent to such registration.

The loan agreement dated 27 February 1987 containing the clause allowing the first defendant to caveat the second defendant's lands then or thereafter acquired was made and the caveat Instrument No L 3616/1987 sought to be removed in this action was registered without the consent of the first plaintiff as the prior chargee. And the first defendant admitted having, at all material times, knowledge of the existence of the covenant against dealing in the above-mentioned.

The said land lot 3206 was subsequently subdivided into eight lots, each with a separate land title with plaintiff Nos 2 to 8 and the second defendant each holding 1/8 undivided share in each of the eight lots. All the eight land titles were issued on 16 October 1987 and had the caveat L 3616/1987 lodged by the first defendant registered thereon. (See exhs 'G', 'H', 'I', 'J', 'K', 'L', 'M', and 'N' annexed to the affidavit affirmed by plaintiff Nos 4, 5, 6 and 7 on 23 August 1988.)

The first defendant having refused to comply with the demand contained in the letter issued on 8 January 1988 on behalf of plaintiff Nos 2 to 8 and the second defendant, the plaintiffs began this action.

There is undisputed evidence that a semi-detached house has been built on each of the subdivided lots and each of plaintiff Nos 2 to 8 and the second defendant either by themselves or their assigns or representatives are occupying one unit. Some of them have entered agreements with others for the resale of the houses.

At the hearing of this application on 5 January 1989, the second defendant did not appear nor was he represented. He had made two affidavits: one on 24 August 1988 filed on behalf of the plaintiffs and the other on 29

October 1988 filed on behalf of the first defendant. In the second affidavit, he retracted the first affidavit contending that he could not read or understand English and did not fully understand the content in the latter. Without properly satisfying myself of the second defendant's contention about his inability or failure to understand, I was not prepared to accede to the defence submission that the first affidavit should not be used. However, the matter was dropped as counsel abandoned the issue, leaving it to me to give whatever weight as may be considered properly due to the deponent's evidence. Be that as it may, in coming to the conclusion of this action, I have not found it necessary to rely upon any of the matters stated in the second defendant's first affidavit.

There is evidence that plaintiff Nos 2 to 8 and the second defendant had executed a 'Memorandum of Transfer By Way of Partition' dated 1 December 1987 under which each of them was to be exclusively allocated a subdivided lot (exh 'E' annexed to the fourth plaintiff's affidavit) and that it could not be registered because of the caveat lodged by the first defendant. These have not been denied by both defendants.

It ought also to be pointed out that no specific relief has been claimed against the second defendant in this action. This probably was because initially the second defendant was agreeable to the relief sought in this application. There was a subsequent change of mind and, as a result, he, instead of being joined as a co-plaintiff as intended by the plaintiffs, was added as a co-defendant.

For the first defendant, it was first contended that the first plaintiff had no locus standi, there being no privity of contract between it and the first defendant and that the first plaintiff therefore had no right to ask for the removal of the first defendant's caveat and the joinder of the first plaintiff in this action was misconceived. With respect, I am unable to agree. Section 177(1) of the Land Code (Sarawak) (Cap 81) provides:

> Any registered proprietor or any other person having a registered estate or interest in the estate or interest against which a caveat has been lodged, may at any time, if he thinks fit, apply to the High Court for an order that the caveat be removed.

It is not disputed that the first plaintiff is a registered chargee. The first defendant had lodged a caveat against the estate or interest in which the first plaintiff has a registered estate or interest. The first plaintiff complains that the first defendant has no caveatable interest and that there has been a breach of the covenant against dealing without its consent as stipulated in the charge. In my opinion, the first plaintiff comes within the said s 177(1) and is entitled to apply.

In *Pok Kew Chai* v *Yeoh Thian Seng & Anor*[1] it was held (at p 223) that a chargee had locus standi under s 326(1) of the National Land Code 1965 to apply for the removal of a caveat. While it is true that the provisions in the said two sections of the two Codes are not the same, s 177(1) of the Land Code (Sarawak) appears more liberal in that it enables any person having a registered estate or interest in the estate or interest, against which a caveat has been lodged, to apply to the court.

In the case of the other plaintiffs (ie other than the first plaintiff), the 'Memorandum of Transfer By Way of Partition' which the second defendant had also signed could not be registered because of the caveat lodged by the first defendant. They are registered co-proprietors of the sublots. They are also affected and accordingly have the locus standi to seek relief.

It was also submitted for the first defendant that the caveat it lodged, claiming an interest in a specific portion of the land and having the effect of covering only the particular interest claimed, was regular, in proper form and consistent with the provisions of the Land Code. However the form of the caveat and the procedural regularity of lodging it are not in issue. The application for the removal of the caveat relies on grounds other than for the want of proper form or procedural irregularity in its lodging.

The jurisdiction of the court to remove a caveat is governed by s 177(2) of the Land Code (Sarawak) (Cap 81) which provides:

> The Court, upon proof that notice of such application has been duly served, may make such order in the premises, either ex parte or otherwise, as in the circumstances seems just.

The application is based on two grounds. Firstly, it was contended for the plaintiffs that the second defendant, Ling Ting Sing, by creating the memorandum of charge containing the covenant prohibiting registration of any dealing against the said land lot 3206 during the period of the charge, had put himself under a legal disability to enter into the loan agreement dated 27 February 1987. With respect, there is, in my judgment, no merit in the contention. I fail to see why he could be incapable of entering into the loan agreement though the question of lodging a caveat by virtue of the agreement requires different consideration.

I agree with the contention raised on behalf of the first defendant that a caveat does not come within the definition of 'dealing', and the covenant in the charge Instrument No L 808/1986 prohibiting the registration of dealing without the consent of the first plaintiff, therefore, is of no assistance to the first plaintiff. However, this does not conclude the matter, for the second contention of the plaintiffs is that the first defendant has no caveatable interest in the second defendant Ling Ting Sing's 1/8 share in each of the eight sublots and the loan agreement does not entitle the first defendant to lodge the caveat.

To have a caveatable interest, the first defendant must come within the scope of s 173(a) of the Land Code (Sarawak) (Cap 81), the relevant part of which reads:

Any person —

(a) claiming to be entitled to or to be beneficially interested in any land, estate or interest under this Code by virtue of any unregistered agreement or other instrument or transmission, or of any trust express or implied or otherwise howsoever; ... may at any time lodge with the Registrar a caveat in Form O in the First Schedule.

Upon close examination of the loan agreement, it is clear that it is not a memorandum of charge capable of being registered as such under the Land Code (Sarawak) (Cap 81), nor is it to all intents and purposes an agreement for a charge. It does not stipulate a promise by the second defendant to charge his land nor does it indicate that the loan had any connection with the land. Clause 7 thereof, which has been reproduced above, merely stipulated agreement on the part of the second defendant, as borrower, to allow the first defendant, as lender, to caveat the second defendant's landed properties already acquired or to be acquired. The agreement, it may be noted, was granted with full knowledge on the part of both defendants of the existence of the charge created by the registered landowners, including the second defendant, in favour of the first plaintiff with an express covenant against registration of dealing without the consent of the first plaintiff as the chargee. Assuming the second defendant could give consent to the entry of the caveat, such a consent by itself does not, in my opinion, give rise to a registrable interest capable of sustaining the entry of a caveat. It is clear that a caveat is not an instrument of dealing and by itself confers no registrable interest. It does not create an interest or estate but merely acts as a notice of claim to interest or title to land. Since the first defendant has not obtained a registrable interest under the loan agreement, it cannot lodge a caveat by virtue thereof. Furthermore, in the affidavit of Ting Pik King made on 20 April 1988 on behalf of the first defendant as its managing director, it was admitted that the loan agreement was not meant for registration, and in para 5 thereof, Ting Pik King admitted that there was no dealing to be registered. That being so, the caveat is all the more reason unsupportable.

I am aware that in para 5 of his second affidavit the second defendant deposed that when he agreed to allow the first defendant to caveat his 1/8 share in the said land the intention was that 'the same' should be security for the loan. It is obvious from the said para 5 that the expression 'the same' means the caveat. As stated earlier, a caveat by itself confers no registrable interest.

As regards the credibility of the second defendant, he has at least proved to be capable of giving evidence without proper care and without first ensuring it had been properly understood. His evidence must be treated with extreme care. Having considered his evidence and his conduct in this case, I find him unreliable.

Now, assuming that the loan agreement could be regarded as an unregistered charge or an agreement to charge the land as security for the loan, owing to the lack of consent from the first plaintiff as the prior chargee, there cannot arise a 'dealing' or 'instrument' as defined in the Land Code capable of conferring any registrable interest in the land in respect of which a caveat may be entered. (*R & I Securities Sdn Bhd* v *Golden Castle Finance Corp (M) Bhd.*[2]) In that case the registered landowner, after having charged its land to Golden Castle Finance Corp (M) Bhd, sought to charge the land to R & I Securities Sdn Bhd without the consent of the corporation which refused to grant it. The first charge contained a clause forbidding the landowner from charging or dealing with the land charged without the prior written consent of the chargee. And it was held that the landowner had, by the said clause, disabled itself from creating further charges without the consent of the first chargee. The same principle applies to the instant case. Without the consent of the first plaintiff as the prior chargee, the second defendant was under a disability to create a further charge or agreement to grant a further charge capable of conferring a registrable interest in land in respect of which a caveat may be lodged.

A feeble attempt was made suggesting that the second defendant held his 1/8 share in the land in trust for the first defendant and that by virtue of the trust, the caveat came within s 173 (a) of the Land Code (Sarawak) (Cap 81). With respect, I am unable to accept the contention. There is no evidence of a trust, nor evidence capable of suggesting the existence of a trust.

As for the first defendant, there is clear evidence from the affidavit of its managing director Ting Pik King sworn on 20 April 1988 that the first defendant was fully aware of the restriction to register any dealing against the land without the consent of the first plaintiff. The loan was advanced with full knowledge of the situation.

Having regard to all the facts and circumstances, I consider it just and proper that the caveat lodged by the first defendant ought to be forthwith withdrawn.

For the above reasons and pursuant to s 177(2) of the Land Code (Sarawak) (Cap 81), the application is allowed. I order that the caveat dated 14 March 1987 lodged by the first defendant and registered at the Sibu Land Registry Office on 18 June 1987 as Sibu Instrument No L 3616/1987 affecting the said land lot 3206 Sibu Town District now known as lot 390 to lot 397 (both inclusive) all in Block 10 Seduan Land District be forthwith withdrawn. There shall also be an order that costs of this application be paid by the first and the second defendants to the plaintiffs. In the absence of an agreement, such costs may be taxed.

Application allowed.

Solicitors: *Battenberg & Talma; Thomas & Co.*

Reported by *Kevin Mathews*